IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 201

ROBERT DRAPER AND RAYMOND LORENTZEN,

Petitioners,

vs.

WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONERS

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Opinion Below

The opinion of Justice Rosellini for Department One of the Supreme Court of the State of Washington (R. 77) is reported at 58 Wash. 2d 830, 365 P. 2d 31 (1961).

Jurisdiction

The order granting motion for leave to proceed *in forma pauperis*, and granting the petition for certiorari, was entered on June 25, 1962 (R. 85). The jurisdiction of this court rests on 28 U.S.C. 1257.

Questions Presented

1. Whether, consistent with the Equal Protection and Due Process clauses of the Fourteenth Amendment, a state may refuse poor persons, but not others, the right of appeal in felony cases whenever the trial judge finds their claims of error are "frivolous."

2. Whether, as regards the supplying of free transcripts in appeals *in forma pauperis* from felony convictions, the rules applied by the courts of Washington satisfy Equal Protection and Due Process. (See *Woods* v. *Rhay*, 54 Wash. 2d 36 at 44-45, 338 P. 2d 332 at 337 (1959).)

3. Whether the petitioners, who were convicted and sentenced to a maximum of 40 years in the state penitentiary, are entitled under Equal Protection and Due Process to receive a free transcript of the testimony at their trial so that they may obtain the same appellate review of alleged errors as if they had money to buy the transcript.

Statement

On August 3, 1960, both petitioners were charged with two counts of robbery in a joint information filed by the Prosecutor of Spokane County, Washington, in the Superior Court of the State of Washington for Spokane County (R. 1-2). Being without funds, petitioners requested and were provided court-appointed counsel (R. 33). They were tried by a jury September 12-14, 1960, and found guilty on both counts (R. 3-4).

On September 15, 1960, petitioners filed motions for new trial alleging errors of law and fact (R. 3). September 30, 1960, their motions were denied (R. 3-4). They were ad-

judged guilty and sentenced to maximum terms of 40 years in the state penitentiary at Walla Walla (R. 4-7).

On October 20, 1960, petitioners filed timely notices of appeal from the judgments of conviction (R. 8-9). Five days later they filed identical motions and affidavits requesting a free transcript of the record and statement of facts (R. 10-13). [Washington practice refers to copies of the various documents filed with the clerk of the trial court as the "transcript of the record," Rule 44 of Rules on Appeal; and to the court reporter's transcription of trial proceedings as the "statement of facts," Rule 35 of Rules on Appeal, RCW, Vol. "O," Appeal—pp. 22.1-24 and 16, 34A Wash. 2d 47-49 and 38.]

The rules laid down by the Supreme Court of Washington which govern the supplying of free transcripts are as follows:

> "1. An indigent defendant in his motion for a free statement of facts must set forth:
>
> "a. The fact of his indigency
>
> "b. The errors which he claims were committed; and if it is claimed that the evidence is insufficient to justify the verdict, he shall specify with particularity in what respect he believes the evidence is lacking. (The allegations of error need not be expressed in any technical form but must clearly indicate what is intended.)
>
> "2. If the state is of the opinion that the errors alleged can properly be presented on appeal without a transcript of all the testimony,
>
> "a. it may make a showing of what portion of the transcript will be adequate, or

"b. if it believes that a narrative statement will be adequate, it must show that such a statement is or will be available to the defendant.

"3. The trial court in disposing of an indigent's motion for a statement of facts at county expense shall enter findings of fact upon the following matters:

"a. The defendant's indigency

"b. Which of the errors, if any, are frivolous and the reasons why they are frivolous[5]

"c. Whether a narrative form of statement of facts will be adequate to present the claimed errors for review and will be available to the defendant; and, if not

"d. What portion of the stenographic transcript will be necessary to effectuate the indigent's appeal.

"4. The trial court's disposition of the motion shall be by definitive order." *Woods* v. *Rhay*, 54 Wash. 2d 36 at 44-45, 338 P. 2d 332 at 337 (1959).

"[3] Where court-appointed counsel has represented the defendant at the trial, his services should be made available to the defendant for the purpose of presenting the motion.

"[4] See *State* v. *James*, 252 Minn. 243, 89 N.W. (2d) 904, 906.

"[5] For an example, see Judge Roney's letter in *In re Grady* v. *Schneckloth*, 51 Wn. 2d 1, 8; 314 P. (2d) 930."

In accordance with these rules, each petitioner alleged in support of his motion for free transcript that he had no funds (R. 10, 12), and that "unless [he] is provided with a transcript and statement of facts at the county expense, he will be unable to prosecute this appeal" (R. 11, 13). Each listed thirteen "errors committed in the trial," including:

"(6) That the trial Judge was prejudiced against the Defendants throughout the entire trial.

"(7) That the trial Judge should have dismissed the case as the Defendants are not guilty as charged.

"(8) That exhibits were entered over objections that should not have been allowed to be entered.

"(9) That testimony was allowed over objections that should not have been allowed" (R. 10-11, 12-13).

On November 25, 1960, the Prosecutor of Spokane County served upon petitioners' counsel a "Counter-affidavit resisting motion for free transcript" (R. 19-22). The Prosecutor did not deny the petitioners' allegations of poverty, nor that they would be unable to prosecute the appeals unless given a free transcript of all the testimony (R. 19-22). His counter-affidavit did allege evidence which, he believed, established petitioners' guilt "overwhelmingly" (R. 22), and he contended "that there is no merit in any of the allegations of error . . ., that these are frivolous appeals" (R. 22).

On November 28, 1960, petitioners' motions for free transcript of record and statement of facts were heard before the trial judge who had presided at the jury trial (R. 32-33). Petitioners' counsel, who had represented them at the trial, raised the federal constitutional issue of their right to a free transcript (R. 36 and see R. 43, 48-49), and asserted it would take substantially all of the record to review the petitioners' contentions (R. 36). He contended that the state had failed to prove the existence of one of the corporations alleged to have been robbed (R. 36); that the petitioner Draper had been identified at the scene of the crimes by only one person, an alleged accomplice who had pleaded guilty (R. 35-36); and that prejudicial error had

been committed by the trial court's admitting as exhibits an improperly identified gun and a jacket with allegedly stolen money in the pocket (R. 38).

The petitioner, Mr. Draper, also presented oral argument at the hearing on his motion for free transcript and statement of facts (R. 39-45). The trial judge asked Mr. Draper to discuss each of his 13 allegations of error (R. 40), and he attempted to do so (R. 40-43). Illustrative of this colloquy is Draper's discussion of his contention that testimony was improperly allowed over objections:

> "Mr. Draper. * * * There is testimony which was objected to but which was allowed to stand, and in some cases you instructed the reporter to have it stricken from the record, and there was nothing in the instructions to contradict that, and any time you speak in court, that is an instruction, if it is not directed to the prosecutor or to defendant's counsel, the jury listens to it all.
>
> "The Court. What did I say?
>
> "Mr. Draper. If you offer an opinion, or a thought, or anything to show how you feel.
>
> "The Court. What did I do?
>
> "Mr. Draper. I don't remember, because I don't have the transcript, but I remember a very great feeling at the time of the trial over this". (R. 41).

The Prosecutor sought to refute the arguments of petitioners' counsel, and of Mr. Draper, by reciting his own recollection of the evidence at the trial (R. 46-48). He summarized his contention that petitioners were not entitled to free transcript (and, therefore, not entitled to an appeal) as follows:

> "* * * In short, your Honor, my view of these errors is that they don't allege in any particular, any mate-

> rial or substantial error in this case. In fact, my impression of the arguments on behalf of Mr. Draper —conceding again that he is not a lawyer—is that he doesn't know what is in the record and he would like a free transcript so he can see if there is anything in support of these claims of error" (R. 48).

At the conclusion of the hearing, the trial judge announced that, in passing upon the motion for free transcript, "it is for the Court to determine whether or not there is any merit to the claims of error which have been made here" (R. 49). "It is," he said, "the overall picture that we have to look at" (R. 49). He concluded that the evidence of petitioners' guilt was "overwhelming," that the motion for free transcript was frivolous, and should be denied (R. 53). However, the trial judge noted, in his oral opinion,

> "• • • that does not prevent the Supreme Court from reviewing this matter, because this Court is making findings of fact, which will set forth the substance of the testimony that supports the necessary allegations and proof of robbery, and that can be presented to the Supreme Court by certiorari, which is a procedure available to you, and if the Supreme Court says there is a question here which justifies Spokane County paying the expense of the appeal by making available to you a full transcript, that will be done" (R. 53).

In accordance with his opinion from the bench, the trial judge on December 12, 1960, entered formal findings of fact and conclusions of law and order denying free transcript (R. 23-31). The trial judge did not find, either in his oral opinion or his formal findings, that the petitioners could obtain appellate review of their allegations of error

with anything less than a complete transcript of the court reporter's notes taken during the trial (R. 48-53, 23-29).

On February 8, 1961, petitioners requested the Supreme Court of Washington to review in a certiorari proceeding the ruling of the Superior Court for Spokane County denying them a free transcript (R. 55-58).

On February 13, 1961, the State Supreme Court ordered the review "in accordance with the rules announced in In re Woods v. Rhay (1959), 54 Wash. 2d 36" (R. 58-59).

On September 28, 1961, the Supreme Court of the State of Washington, Department One, by Rosellini, *J.*, announced a unanimous opinion that the petitioners were not entitled to a free transcript of record or statement of facts. The State Supreme Court, without benefit of transcript of the trial proceedings, determined that each of the 13 assignments of error was "frivolous" (R. 77-82).

By order entered June 25, 1962, this court granted the petitioners' motion for leave to proceed *in forma pauperis*, and granted their petition for certiorari (R. 85).

Summary of Argument

I

Equal Protection and Due Process require that states granting the right of appeal in felony cases grant it alike to the poor and the rich. Such states therefore must supply free transcripts of the trial proceedings for indigent appellants when necessary to assure adequate and effective appellate review. *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 (1958); compare *Burns* v. *Ohio*, 360 U.S. 252 (1959); and *Smith* v. *Bennett*, 365 U.S. 708 (1961).

About 50 per cent of the men and women charged with major crimes in state courts have no money to conduct a defense or prosecute an appeal. If Equal Protection of the Laws and Due Process are to be a reality for these unfortunate Americans, this Court must continue to extend a protective arm in cases such as this one.

II

The procedures of the State of Washington in criminal appeals have the effect of discriminating against appellants who cannot afford to buy a transcript, and are therefore unconstitutional.

A. The Constitution of Washington expressly grants the right of appeal in all criminal cases. Constitution of Washington, Amendment Ten, RCW, Vol. "O," p. 98.

B. Nevertheless, the Supreme Court of Washington ordinarily will not consider an appeal unless the appellant supplies the court with a transcript of the portion of the trial proceedings in which he alleges error was committed. Rules 34-40 of Rules on Appeal, Statement of Facts, etc., RCW, Vol. "O," Appeal—pp. 15-30, 34A Wash. 2d 36-58; *Woods* v. *Rhay*, 54 Wash. 2d 36 at 42-45, 338 P. 2d 332 at 336-337 (1959).

C. When the appellant is financially able to buy a full transcript of the trial proceedings, the Supreme Court of Washington grants a full appellate review of these proceedings—regardless of what the trial judge may think of the merits of the appeal. Rule 46, Appeals in Criminal Cases, RCW, Vol. "O," Appeal—pp. 24-26, 34A Wash. 2d 50-53. Indeed the appellate procedure for persons with means does not afford the trial judge an opportunity to express his view on the merits of the appeal. Rule 46(4).

Rules on Appeal, Appeals in Criminal Cases, RCW, Vol. "O," Appeal—p. 25, 34A Wash. 2d 50 at 51.

The Washington practice does not permit the dismissal of a criminal appeal upon summary motion when the prosecution contends it is "frivolous." If paid for, and all procedural requirements complied with, such an appeal is heard by the Supreme Court with oral argument and full consideration. Rule 46, Appeals in Criminal Cases; Rule 49, Arguments; and Rule 63, Appeals to be Heard on Merits. Rules on Appeal, RCW, Vol. "O," Appeal—pp. 24, 27, 35, 34A Wash. 2d 50, 54 and 65.

D. Indigent defendants are not accorded an equal right of adequate and effective appellate review in criminal cases. A poor person convicted of a felony can appeal only if he can obtain a free transcript, and he can obtain a transcript only if the trial judge believes that his grounds for appeal are not "frivolous." *Woods* v. *Rhay,* 54 Wash. 2d 36 at 44-45, 338 P. 2d 332 at 337 (1959); *State* v. *Long et al.,* 58 Wash. 2d 830, 365 P. 2d 31 (1961) (R. 77); Rule 46(11) of Rules on Appeal, Appeals in Criminal Cases, RCW, Vol. "O," Appeal—p. 26, 34A Wash. 2d 52-53.

If the trial judge decides that his contentions are patently without merit, and therefore "frivolous," the poor person may have this decision reviewed by the Supreme Court of Washington in a certiorari proceeding. *Woods* v. *Rhay,* 54 Wash. 2d 36 at 45, 338 P. 2d 332 at 338 (1959). But the review, made without a transcript, is so limited as to be meaningless.

Indigent appellants who successfully run this procedural gamut and finally succeed in obtaining a free transcript, then must prosecute their appeals from the beginning. By reason of poverty, they will have lost months, perhaps years, in obtaining appellate review. Being unable to raise

bail, they will have been deprived of their liberty throughout this period.

There is no justification for the State of Washington thus to handicap the impoverished defendant. The cost of having the court reporter transcribe his trial notes is inconsequential when compared with the total cost incurred by the state to provide adequate law enforcement, a judicial system, and penal institutions. But whatever the cost, the Constitution does not attempt to weigh liberty on the same scales as gold.

III

Since Washington allows those who have funds to obtain full appellate review of the transcript of their trial proceedings, it must supply the petitioners with a free transcript so that they, too, may obtain adequate and effective appellate review. *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 (1958).

ARGUMENT

As matters stand, the petitioners, sentenced to 40 years in the penitentiary, never will be allowed to appeal unless this Court requires the State of Washington to provide them a transcript at public expense. We contend that the Equal Protection and Due Process clauses, and the decisions of this Court construing them, entitle the petitioners to receive a transcript so that they may obtain the same appellate review as if they had money to buy the transcript.

We further contend that the rules of the Supreme Court of Washington, announced in *Woods* v. *Rhay*, 54 Wash. 2d 36 at 44-45, 338 P. 2d 332 at 337 (1959), governing requests of indigent appellants for free transcripts, violate the

Equal Protection and Due Process clauses. When read together with the other rules of the State of Washington on criminal appeals, they impose a much heavier burden on the indigent appellant than on the non-indigent appellant, and do not provide poor persons with adequate and effective appellate review.

I.

Equal Protection and Due Process require that states granting the right of appeal in felony cases grant it alike to the poor and the rich. Such states therefore must supply free transcripts of the trial proceedings for indigent appellants when necessary to assure adequate and effective appellate review.

This Court has not yet held that persons convicted of felonies are constitutionally entitled to an appeal. But it has unequivocally decided that when a state grants the right of appeal it must do so on equal terms for the rich and the poor.

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. * * *
>
> "* * * [T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no

> equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate an appellate review as defendants who have money enough to buy transcripts." *Griffin* v. *Illinois*, 351 U.S. 12, 18, 19 (1956).

Illinois has therefore been required either to furnish a free transcript of testimony, or to find other means of affording "adequate and effective appellate review," for an indigent defendant in a case where the state did not deny that the record might show prejudicial error. *Griffin* v. *Illinois*, 351 U.S. 12, 20 (1956). The State of Washington, similarly, has been required to furnish a free transcript to an indigent appellant even though the trial judge had refused his request, and had found that "justice would not be promoted . . . in that defendant has been accorded a fair and impartial trial, and . . . no grave or prejudicial errors occurred therein." *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 215 (1958).

> "The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 at 216 (1958).

Subsequent decisions of this Court have extended the principle of *Griffin* and *Eskridge* to other types of fees which states collect from appellants in criminal proceedings. Ohio has been required to allow an indigent's appeal to the state's highest court although he could not pay the filing fee—and although appeals to Ohio's highest court

are by leave and not of right. *Burns* v. *Ohio*, 360 U.S. 252 (1959).

> "The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." 360 U.S. at 258.

Iowa has been required to waive its filing fee in habeas corpus proceedings so that indigent prisoners could present their petitions on the same basis as non-indigents. *Smith* v. *Bennett*, 365 U.S. 708 (1961).

If Equal Protection of the Laws and Due Process of Law are to be a reality in our country, this Court must continue to extend its protective arm to indigent criminal defendants. Paupers constitute a high percentage of the men and women charged with violation of criminal laws. In the federal court system, it has been estimated as about 25%; in the district court for the District of Columbia, about 45%. Boskey, *The Right to Counsel in Appellate Proceedings*, 45 *Minn. L. Rev.* 783, n. 1 (1961). The Attorney General of the United States recently told the convention of the American Bar Association that,

> "Last year, almost thirty percent of the defendants in the 34,008 criminal cases in Federal court could not afford counsel. In the District of Columbia, where the Federal District Court hears all felony cases, over half the defendants had to be assigned attorneys. The situation in the states is comparable." *Address of Attorney General of the United States Robert F. Kennedy*, 85th Annual Meeting, House of Delegates, American Bar Association, August 6, 1962.

In the state courts, indigents probably constitute an even higher percentage of the defendants in criminal actions.

The National Legal Aid and Defender Association, of which the Chief Justice of this Court is Honorary President, estimates that "Our own surveys of state Public Defenders indicate that at least fifty per cent of all defendants indicted are too poor to provide their own counsel and must be represented by Public Defenders." See Appendix "A." Cases such as the present case test whether these unfortunate Americans will receive justice.

II.

The procedures of the State of Washington in criminal appeals have the effect of discriminating against appellants who cannot afford to buy a transcript, and are therefore unconstitutional.

A. *The Constitution of Washington expressly guarantees "the right of appeal in all criminal cases." Constitution of Washington, Amendment Ten, RCW, Vol. "O," p. 98.* Indeed, the Constitution of Washington further guarantees that,

> "In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights [of appeal, etc.] herein guaranteed." *Ibid.*

The latter provision has been construed by the Supreme Court of Washington not to apply to appellate proceedings. *State ex rel. Mahoney* v. *Ronald*, 117 Wash. 641, 202 Pac. 241 (1921).

B. *The Supreme Court of Washington ordinarily will not consider an appeal unless the appellant supplies the court with a transcript of that part of the trial proceedings in which he alleges error was committed.*

Petitioners do not seek a free transcript of their trial just for an exercise or a diversion. They seek the transcript

because, being poor, they cannot attain appellate review of their 40-year sentences without first obtaining the transcript. It is the *sine qua non* of their appeals.

As a general rule, the Supreme Court of Washington will not consider an appeal unless the appellant supplies a transcript of the portion of the trial proceedings in which he alleges error occurred. An appeal will be dismissed by the Clerk of the Supreme Court upon three days' notice if such a transcript is not timely filed. Rule 46(11) of Rules on Appeal, Appeals in Criminal Cases, RCW, Vol. "O," Appeal—p. 26, 34A Wash. 2d 50 at 52-53.

The few exceptions to this general rule are not available to petitioners. They apply where the appeal presents solely a question of law, or the parties agree upon a narrative statement summarizing the facts essential to decision of the alleged errors. *Woods* v. *Rhay*, 54 Wash. 2d 36 at 42, 38 P. 2d 332 at 336 (1959). Petitioners' allegations of error—prejudice of the trial judge, insufficiency of evidence, and improper admission of testimony and exhibits—cannot be considered on their merits without a full transcript of the court reporter's notes. So clearly is this true that the Prosecutor in his affidavit opposing a free transcript did not contend that the alleged errors could be reviewed with anything less than a full transcript (R. 19-22).

The trial judge in his "findings of fact" did not find that the petitioners' contentions of error could be decided on their merits with an agreed statement of facts, or with any other substitute for a complete transcript (R. 23-29). The silence of the trial judge's findings on this point is the more significant because the rules of the Washington Supreme Court in these cases require specific findings of fact on

"• • • •

"3. Whether a narrative form of statement of facts would be available to defendant and adequate to present for review of the claimed errors." *Woods v. Rhay*, 54 Wash. 2d 36 at 45, 338 P. 2d 332 at 337 (1959).

C. *When appellants are able to buy a full transcript of their trial proceedings, the State of Washington grants them a full and direct appellate review.*

An appellant with funds has an easy and direct appeal to the Supreme Court of Washington in all criminal cases. Within 30 days after the entry of judgment, he files a notice of appeal in duplicate with the Clerk of the Superior Court in which he was convicted. Rule 46 of Rules on Appeal, Appeals in Criminal Cases, RCW, Vol. "0," Appeal—p. 24, 34A Wash. 2d 50. Thereafter within the several time limits prescribed by Rule 46, he must:

(1) Transmit to the Clerk of the Supreme Court the portions of the Clerk of the Superior Court's files he believes relevant,

(2) Serve and file with the Clerk of the Superior Court the statement of facts (i.e., all or the relevant portions of the transcription of the court reporter's notes and the exhibits),

(3) Obtain the trial judge's certification of the accuracy of the statement of facts,

(4) Pay the Clerk of the Supreme Court a $5.00 docket fee, and

(5) File his brief.

When he has done these things, his case is docketed for hearing by the Supreme Court. Rule 11, Assignment of

Causes, and Rule 12, Calendar. Rules on Appeal, RCW, Vol. "O," Appeals—p. 5, 34A Wash. 2d 19.

At no stage in perfecting his appeal must the pecunious appellant convince the trial judge that his appeal is not "frivolous." If he has the price charged by the clerk for certified copies of documents in his file ($2.00 for the first page, plus $1.00 for each additional page), and the price charged by the court reporter for transcribing his notes (.60¢ per page for the original, plus .60¢ per page for the first carbon copy and .30¢ per page for additional carbon copies), he gets before the Supreme Court regardless of what the trial judge may think of his allegations of error. In fact, the pecunious appellant is not required to disclose his contentions of error until he files his opening brief, and the trial judge never gets the opportunity to comment upon them. Rule 42, Contents and Style of Brief; Rule 43, Errors Considered; Rule 46, Appeals in Criminal Cases. Rules on Appeal, RCW, Vol. "O," Appeal—pp. 20, 22.1, 24; 34A Wash. 2d 44, 47.

D. *Indigent defendants in the State of Washington are not accorded an equal right of adequate and effective appellate review in criminal cases.*

Under Washington procedures, an indigent defendant travels a tortuous road in seeking appellate review. His filing of the Notice of Appeal with the Clerk of the Superior Court does not present difficulty. But then his trouble begins. He cannot order the clerk to certify the court files, nor the court reporter to transcribe the trial notes; this takes money. His next step must be to petition the trial judge for a free transcript of record and statement of facts. The rules which guide the trial judge in disposing of his petition, as laid down in *Woods* v. *Rhay*, 54 Wash. 2d 36, 338 P. 2d 332 (1959), are quoted in full in the Statement, pp. 3-4, above.

As administered by the courts of Washington, the rules governing free transcripts come to this: If the trial judge, acting upon his recollection of the trial, believes that the grounds for appeal are "not frivolous" the appellant gets a free transcript of record and statement of facts, and may proceed with the other steps in perfecting his appeal. If the trial judge thinks the appeal "frivolous," the appellant gets no transcript or statement, and his appeal is blocked.

The indigent appellant, if denied a record by the trial court, will have his appeal dismissed for failure to supply the record. Rule 46(11) of Rules on Appeal, Appeals in Criminal Cases, 34A Wash. 2d 50-53, RCW, Vol. "0," Appeal—pp. 24-26. It is true that he may have the order of denial reviewed by the Supreme Court of Washington in a certiorari proceeding. *Woods* v. *Rhay*, 54 Wash. 2d 36 at 45, 338 P. 2d 332 at 338 (1959). But this review proceeding does not place the statement of facts, nor any part thereof, before the Supreme Court. It places before that court only the trial judge's "findings of fact" reciting "which if any of the errors were frivolous and the reasons why."

If the appellant in a certiorari proceeding nevertheless can convince the Supreme Court that the trial judge has given bad reasons for thinking the grounds of appeal "frivolous," he gets a free transcript of record and statement of facts. He can then resume his appeal, by filing these documents, and proceeding with the other steps prescribed by Rule 46.

By the time an indigent appellant has run this obstacle course, months and maybe years will have elapsed. The petitioners, for example, filed their notice of appeal on October 20, 1960. Being unable to raise bail, as a moneyed appellant often can, they are deprived of their liberty throughout the period of the delay.

Clearly the rules applied by courts of Washington in the granting of appeals, and the provision of free transcripts in criminal appeals, deny Equal Protection and Due Process of Law to poor persons. They do not meet the test of Equal Protection and Due Process laid down in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). They "effectively [deny] the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Id.* p. 18.

Nor does the Washington procedure for indigents' appeals meet the requirements of Equal Protection and Due Process as specified in *Eskridge* v. *Washington*, 357 U.S. 214 (1958). *Eskridge* involved the validity of an earlier version of Washington's rules for determining whether indigent appellants are entitled to receive free transcripts. In all important respects the rules considered in *Eskridge* were the same as the rules involved here. There is only this difference: The former rules provided that the indigent appellant receive a free transcript if, in the trial judge's opinion, "justice would be promoted." Under the present rules the indigent appellant receives a free transcript if, in the trial judge's opinion, the allegations of error are "not frivolous."

The constitutional defects in Washington's procedures, noted *Per Curiam* in *Eskridge*, were not cured by the substitution of a new verbal formula to be applied by the trial judge. The new formula puts the defendant at the same disadvantage as the old formula. In order to place his appeal before the Supreme Court, he still has to convince the trial judge whose conduct of the trial he is challenging that his contentions of error have merit, whereas all other appellants are allowed a direct appeal to the Supreme Court. And he must do this without the help of a transcript of the testimony at the trial. This Court said in *Eskridge* that

> "[t]he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 216 (1958).

In the words of Mr. Justice Stewart, "Justice demands an independent and objective assessment of a district judge's appraisal of his own conduct of a criminal trial." Concurring opinion, *Coppedge* v. *United States*, 369 U.S. 438 at 455, 456 (1962).

There is no justification for the State of Washington or any other state handicapping the improverished defendant by making it difficult to obtain a free transcript. The cost to the state of employing the court reporter to transcribe his notes is inconsequential, compared to the total cost of administering justice, for example, the costs required to provide sheriffs' offices, court houses, judges, juries, clerks, court reporters, bailiffs, jails, penitentiaries, etc. But whatever the cost, the Constitution does not attempt to weigh liberty on the same scales as gold.

The state which bears the burden and costs of establishing guilt beyond reasonable doubt, of providing impartial and able triers of fact and law, of insuring that clerical procedures safeguard due process of law, of publishing the results from the judicial process—this sovereign should not balk at supplying transcripts of record adequate to accomplish for all the judicial review which the state maintains. The bogey behind "opening the door" may be suggested, but this Court has noted that the feared flood of released felons resulting from *Griffin* v. *Illinois* has not materialized. *Mapp* v. *Ohio*, 367 U.S. 643, 659, n. 9 (1961).

It may also be suggested that poor defendants if provided free transcripts would appeal more readily, and clog the courts with unfounded appeals. But the suggestion assumes that rich defendants are deterred from appealing by financial considerations. It seems unlikely that a moneyed man, convicted of robbery and sentenced to a maximum of 40 years in the penitentiary, would forego an appeal in order to save his money. There will always be unfounded appeals, and they will not be limited to paupers' appeals.

Criminal appeals by indigents convicted of serious felonies are not to be treated as suspect, so that a special showing on these cases alone is necessary to perfect an appeal. In the words of this Court, "if frivolous litigation exists we are not persuaded that it is concentrated in this narrow, yet vital, area of judicial duty." *Coppedge* v. *United States*, 369 U.S. 438 at 450 (1962). The context of these words is illuminating:

> "Even-handed administration of the criminal law demands that these cases be given no less consideration than others on the courts' dockets. Particularly since litigants *in forma pauperis* may, in the trial court, have suffered disadvantages in the defense of their cases inherent in their impecunious condition, is appellate review any less searching than that accorded paid appeals inapp opriate. Indigents' appeals from criminal convictions cannot be used as a convenient valve for reducing the pressures of work on the courts. If there are those who insist on pursuing frivolous litigation, the courts are not powerless to dismiss or otherwise discourage it." *Coppedge* v. *United States*, 369 U.S. 449-450.

Conclusion

The petitioners are admittedly without funds. They have been convicted of robbery and sentenced to a maximum of forty years in the state penitentiary. Under the rules of the Supreme Court of Washington, as applied here, they have been denied a free transcript and thereby have been denied the right of appeal which a moneyed appellant could obtain. This constitutes a denial of Equal Protection of the Laws and a deprivation of liberty without Due Process of Law.

The judgment of the Supreme Court of Washington should be reversed, with instructions that petitioners be given a free transcript of the proceedings at their trial in order that they may perfect their appeal to the Supreme Court of Washington.

Respectfully submitted,

CHARLES F. LUCE,
Attorney.

November 1962

APPENDIX A

(Letterhead of National Legal Aid and Defender Association, Chicago 37)

August 20, 1962

Mr. Charles F. Luce
Bonneville Power Administration
P. O. Box 3537
Portland 8, Oregon

Dear Mr. Luce:

Sol Rubin of the National Council on Crime and Delinquency has asked us to give you further information on the question raised in your letter of August 3rd addressed to him. Unfortunately, we do not have specific information on all the matters you mentioned. The Administrative Office of the United States Courts in Washington, D.C. may be able to give you statistics on some of your questions.

I also refer you to the *Minnesota Law Review*, Vol. 45, No. 5 (April 1961) which was devoted to a symposium on "The Right to Counsel." There are twelve articles dealing with this subject in the volume.

We know the Administrative Office of the U.S. Courts reports that about 35,000 persons annually are accused of crime in the federal courts, and that one out of every four defendants there is represented by assigned counsel. (The Los Angeles County Public Defender reported 23,626 cases in the year 1959-60.) Our own surveys of state Public Defenders indicate that at least fifty per cent of all defendants indicted are too poor to provide their own counsel and must be represented by Public Defenders.

As to the free transcript question, I know you must be familiar with the case of *Griffin* v. *Illinois*, 351 U.S. 12, the first leading case holding that there was a denial of due process for the state to refuse to furnish a free copy of the transcript of the trial testimony when such transcript is a prerequisite to obtaining an appellate review.

Sincerely,

/s/ Junius L. Allison

Junius L. Allison
Executive Director

JLA:jm
C.C. Mr. Sol Rubin

(Letterhead of National Legal Aid and Defender Association, Chicago 37)

August 24, 1962

Mr. Charles F. Luce
Bonneville Power Administration
P. O. Box 3537
Portland 8, Oregon

Dear Mr. Luce:

As a further answer to your inquiry of August 3, 1962, made to the National Council on Crime and Delinquency and referred to us, I send you the enclosed summary which we made of a spot survey of a few large cities where no Defender organization exists.

Sincerely,

/s/ Junius L. Allison

Junius L. Allison
Executive Director

JLA:jm
Enc.

A spot check (by questionnaires to clerks of court) of the actual number of indictments returned in 1960 in some of these cities reveals the following:

City	No. of Indictments	Counsel Appointed for Indigent
Denver	1,223	531
Nashville	1,177	No record
Fort Worth	1,586	240
San Antonio	952	200
Paterson	821	Everyone has to have counsel
Newark	2,076	731 plus 18 for murder
Jacksonville	6,208	No record
Kansas City	173	No record
Crown Point	18 (29 defendants)	14
Syracuse	314	152
Portland (Oregon)	586	296
Milwaukee	1,470	665
Macomb County, Mich.	480	47
Media, Pa.	1,994	Not known–(Voluntary Defender Committee represented 192)

As a further indication of need in these heavily populated counties, comparison might be made with the population covered and the volume of cases handled by existing Defender offices which report their cases and operating costs.

Despite their limited coverage, 71 offices reporting to NLADA for the year 1960 handled 116,568 new criminal cases. There is a total population of 57½ million in these counties. So, more than two cases are handled out of every 1,000 population. Applying this figure to the 28 million in the large non-defender counties, it may be assumed that

there are approximately 56,000 indigent defendants before the courts each year who must rely upon a court-appointment system for representation or none at all. This and the fact that there are scores of other counties with a population range of 200,000-400,000, without Defender services, reveals a critical problem not only for the impecunious defendant, but for a system of justice based upon the principle of equality before the law.